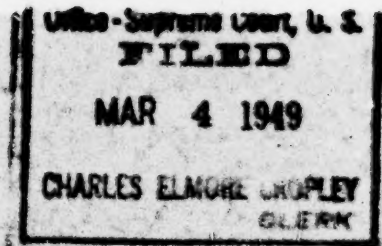


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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1949**

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**No. ~~547~~ 20**

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**OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE OF  
FRED A. MILLER,**

*Appellant,*

*vs.*

**STATE OF WISCONSIN**

---

**APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN**

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**STATEMENT RE JURISDICTION BY J. GILBERT  
HARDGROVE, AMICUS CURIAE**

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**J. GILBERT HARDGROVE,**  
*Amicus Curiae*

**MILLER, MACK & FAIRCHILD,**  
*Of Counsel.*

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**STATEMENT RE JURISDICTION BY AMICUS CURIAE**

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The particular facts in the *Estate of Fred A. Miller* on the basis of which this appeal has been taken, and the text of the statutes involved, are fully set out in appellant's jurisdictional statement and in appellee's statement opposing jurisdiction. The purpose of this Statement re Jurisdiction by *Amicus Curiae* is not to reiterate these facts, but to analyze generally the underlying problem which is here presented to this Court.

The undersigned is of the opinion that the holding of the Supreme Court of Wisconsin in this case presents a substantial federal question in that Section 72.74 as construed

and applied by said Court is repugnant to the Fourteenth Amendment of the Constitution of the United States.

The question here presented concerns the joint application to certain special Wisconsin estates of three separate Wisconsin death duties. In the interests of consistency these shall be referred to hereafter as (1) the Normal Tax, (2) the Wisconsin Estate Tax, and (3) the Emergency Tax.

The *Normal Tax* is levied by Sections 72.01 through 72.24 of the Wisconsin Statutes. It is a graduated inheritance tax measured by the amount of property passing to each legatee and it has varying rates and exemptions which are dependent upon the relationship of the legatee to the decedent. In the great majority of Wisconsin estates the aggregate Normal Taxes exceed the 80% credit for state taxes paid granted by Section 813 (b) of the Internal Revenue Code against the Federal Basic Tax. These estates present no problem. In certain exceptional Wisconsin estates, however, the aggregate Normal Taxes are less than this 80% credit, and it is in these estates only that the problem here presented arises.

The *Wisconsin Estate Tax* is levied by Sections 72.50 through 72.61 of the Wisconsin Statutes. It was enacted in 1931 in order to obtain for the state the benefit allowed by the federal 80% credit. It is equal to the amount, if any, by which the federal 80% credit exceeds the aggregate of the Wisconsin Normal Taxes and of the taxes paid to other states. Its original effect, at the time of its enactment, was to prevent the aggregate state death duties on any Wisconsin estate from totalling less than a *minimum* equal to the federal 80% credit. At the same time the Wisconsin Estate Tax Law provided (and still provides) expressly that this tax shall not cause the aggregate state death duties on any estate to *exceed* the 80% credit. In other words, as this law was originally applied, only the Normal Tax, which is measured by property subject to the taxing jurisdiction

of Wisconsin, could cause the aggregate state death duties to exceed the 80% credit which the estate is obligated to pay to someone in any event.

The *Emergency Tax* is levied by Section 72.74 of the Wisconsin Statutes and was enacted in 1935. It is set up in the form of a separate tax, equal in amount to 30% of all other Wisconsin taxes paid by any estate. In the majority of Wisconsin estates its net effect is merely to increase the Normal Tax rates by 30%, since the Normal Tax is the only one levied. In those special estates where the normal tax is less than the federal 80% credit, however, its effect has been less clear. Since it is as much a transfer tax as any other, and since the Wisconsin Estate Tax provides in terms that it shall equal the amount by which the federal 80% credit exceeds all transfer taxes paid to this or other states, it was originally contended by the executor in this case that the Emergency Tax should also be deducted in computing the Wisconsin Estate Tax. The ruling of the Wisconsin Supreme Court was to the contrary. Hence, the effect of the Emergency Tax, as so construed, is now to raise the minimum Wisconsin tax payable by these special estates to an amount equal to the federal 80% credit, less succession taxes paid to other states, plus 30% of this difference. Further simplified, this means that the aggregate Wisconsin taxes in each such estate now equal exactly 1.3 times the amount of the 80% credit, less death duties paid to other states.

Even before the enactment of the Emergency Tax, the nature of the Wisconsin Estate Tax was such as to cause some constitutional questions under the rule of *Frick v. Pennsylvania*, 268 U. S. 473 (1925). In that case this Court held that a state may not constitutionally measure a tax directly or indirectly by real or tangible personal property situated outside the taxing jurisdiction of the state. The Wisconsin Estate Tax, as originally applied, caused

Wisconsin estates to pay a *minimum tax* equal exactly to the difference between the taxes paid to other states and the federal 80% credit. It is obvious that this tax was not, like the Normal Tax, measured by the property subject to the taxing jurisdiction of Wisconsin. Instead it was a tax measured by the federal 80% credit. This credit was, and is, measured in turn by the federal basic tax, which in its turn is measured by the entire federal gross estate of the decedent containing all his property wherever situated.

This constitutional question was recognized by the Justices of the Supreme Court of New Hampshire in dealing with a substantially identical New Hampshire tax. In *Opinion of the Justices*, 154 Atl. 633 (N. H. 1931) they stated as follows:

"The nation lays a valid tax and makes valid provision for its partial distribution to the several states, through the process of local assessments and the deduction thereof from the federal tax. Substance, not form, governs in these matters; and this is the substance of the whole transaction."

It would seem that the rationale of this decision is sound. The minimum tax levied against these exceptional estates by a statute such as the Wisconsin Estate Tax Law is measured by all of the decedent's property wherever situated. For that reason, where a decedent owns real or tangible personal property outside the jurisdiction of the taxing state, such a tax would be unconstitutional if the tax caused his estate any harm. But in reality the Wisconsin Estate Tax as originally applied was *damnum absque injuria*. It caused the estate to pay to the state only what (in the absence of the tax) it would otherwise be obligated to pay to the federal government. It deprived the estate of no property which would not legally be taken from it in any event, and its true effect was merely to divert funds from one destination to another. As soon as the estate was required to pay



state taxes in excess of the 80% credit, the Wisconsin Estate Tax dropped out and the amount of the Wisconsin tax was thenceforward measured only by property subject to the jurisdiction of the state.

The Wisconsin Emergency Tax, as construed by the Wisconsin Supreme Court in this case, entirely alters this picture. The minimum tax which is required to be paid in the aforementioned special estate now amounts to *more* than the federal 80% credit. At the same time the amount of this minimum tax is still measured by all of the decedent's property wherever situated.

As an example, let us assume a simple Wisconsin Estate where the federal basic tax equals \$125,000, where the Wisconsin Normal Taxes amount only to \$50,000, and where succession taxes amounting to \$10,000 have been paid to other states. The total Wisconsin taxes would then be computed as follows according to the rule adopted by the Supreme Court of Wisconsin in this case:

(1) Normal Tax		\$50,000
(2) Wisconsin Estate Tax		
Federal 80% Credit	\$100,000	
Less: (a) Normal Tax	\$50,000	
(b) Other State		
Taxes	10,000	
Total State Taxes	60,000	
Difference		\$40,000
(3) Emergency Tax		
Normal Tax	\$50,000	
Wisconsin Estate Tax	40,000	
Total	\$ 90,000	
Emergency Tax (30% of Total)		27,000
Total Wisconsin Taxes		\$117,000

This estate is, therefore, being subjected to a minimum Wisconsin ~~tax~~ totalling \$17,000 more than the federal 80% credit. This \$17,000, in the absence of the Wisconsin Emergency Tax levied by Section 7274, would not have to be paid at all. Yet this minimum tax of \$117,000 is measured, *not* by the decedent's property in Wisconsin, but by the federal basic tax which in turn is measured by all the decedent's property wherever situated. This may be seen clearly from the fact that it is not necessary to have any knowledge of what property of the decedent was, or was not, subject to the taxing jurisdiction of Wisconsin in order to compute this minimum Wisconsin tax.

As stated before, the real effect of these Wisconsin Statutes is to prescribe, for these special Wisconsin estates, a minimum tax equal exactly to 1.3 times the amount of the federal 80% credit less death duties, if any, paid to other states. Thus actually the Wisconsin taxes on the estate assumed above (as well as on any such estates) may equally well be computed in the following manner:

Federal Basic Tax	\$125,000
80% Credit	<u>100,000</u>
Less Taxes Paid to Other States	10,000
Difference	\$ 90,000
1.3 times Difference	117,000

Fred A. Miller owned nearly a million dollars' worth of real and tangible personal property in Florida and Illinois. The federal basic estate tax on his entire estate, including this property, was \$788,387 computed to the nearest dollar. The total death duties paid other states amounted to \$57,326. The aggregate of his Wisconsin death duties as computed by the Wisconsin Supreme Court was \$745,399. Yet, without any consideration whatsoever of what property was



subject to the taxing jurisdiction of Wisconsin, these Wisconsin taxes may be computed in the same manner as above:

Federal Basic Tax	\$788,387
80% thereof	630,710
Less Taxes Paid to Other States	57,326
	<hr/>
Difference	\$873,384
1.3 Times Difference	745,399

This is all that is required. The additional figures contained in the method of computation used by the Wisconsin Supreme Court add nothing to the result.

It is respectfully submitted that a Wisconsin tax, which exceeds the extent to which it effects a federal tax saving, and which may be computed in the above manner without any regard to the amount of property subject to the jurisdiction of the State of Wisconsin, is repugnant to the Fourteenth Amendment of the Constitution of the United States under the rule of *Frick v. Pennsylvania*, *supra*.

The effect of these Wisconsin Statutes in taxing property beyond the jurisdiction of Wisconsin is strikingly illustrated in the following example. Let us assume that the estate of a decedent resident of Wisconsin, after the payment of all debts and costs of administration, contained the following property

Real Estate and Securities in Wisconsin	\$35,000
Real Estate in Nevada	\$2,000,000

Only the \$35,000 of Wisconsin property would be subject to the taxing jurisdiction of Wisconsin, but the decedent's federal estate would include his property in both states. Nevada has no inheritance or estate tax. The federal estate tax on this estate, computed to the nearest dollar would be \$639,830. The federal basic tax would be \$127,650, and the 80% credit would amount to \$102,120. The proportional part of the federal taxes deductible from the decedent's

Wisconsin estate under Section 72.04 (8) of the Wisconsin Statutes would be \$11,004, leaving a net Wisconsin Estate of \$23,996. Assuming that the decedent left this \$23,996 to his widow, the computation of the Wisconsin taxes on this estate, in the manner prescribed by the Wisconsin Supreme Court, would be as follows:

(1) Normal Tax			\$ 180
(2) Wisconsin Estate Tax			
Federal 80% Credit		\$102,120	
Less: Normal Tax	\$ 180		
Other State Taxes	0		
Total State Taxes		180	
Difference			101,940
(3) Emergency Tax			
Normal Tax	\$180		
Wisconsin Estate Tax	\$101,940		
Total		\$102,120	
30% Additional Tax			\$ 30,636
Total Wisconsin Taxes			\$132,756

Of this \$132,756, the 80% credit or \$102,120 would be payable to the federal government in any event, if it were not payable to the state. But the difference between these two figures, or \$30,636, is assessed against this estate *only* by virtue of the Wisconsin Emergency Tax, and it amounts to over \$6,000 more than the property that is being taxed in Wisconsin. At the same time it equals exactly 30% of 80% of the federal basic tax on the gross estate of \$2,035,000.

In *Frick v. Pennsylvania*, at page 495 of this Court's opinion, it is stated that the way must not be opened for "doing indirectly what is forbidden to be done directly". . . . If the decision of the Wisconsin Supreme Court

in this case is permitted to stand it would open such a way, for it would give to a state the power to measure its taxes, not by the property subject to its jurisdiction, but by the amount of a federal tax which is measured by property beyond its jurisdiction. By such an indirection a state could obtain for itself the same results which would follow from direct taxation of such property.

It is asserted in the opinion of the Wisconsin Supreme Court that the constitutional problem outlined above does not arise on the facts of this case, since over 80% of the decedent's property was in Wisconsin and the tax is based on an 80% federal credit. This is a *non sequitur*. A tax measured by 80% of the federal basic tax is no less measured by the decedent's federal gross estate than is a tax measured by the entire basic tax. Moreover the distinction is merely one of phraseology. The Wisconsin tax on these estates can just as easily be expressed in terms of the entire basic tax as in terms of 80% thereof. The \$745,399.11 of Wisconsin tax involved in this case is exactly equal to 130% of the difference between 80% of the decedent's federal basic tax and the death duties paid by his estate to other states. It is also equal exactly to 104% of his *entire* basic tax, less 130% of the death duties to other states. The latter formula will just as accurately compute the Wisconsin taxes in this, and all other such Wisconsin estates, as will the former. The fact remains that the amount of this tax is wholly measured by two factors only: (1) The amount of the federal gross estate and (2) the death duties paid to other states. Neither of these factors bears any relation to the value of the decedent's property within the taxing jurisdiction of Wisconsin, and yet that property is the only measure by which this state may constitutionally compute its tax.

It is, therefore, the opinion of the undersigned that this case presents a substantial federal question under the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

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February 15, 1949.

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